

## BACKGROUND

<sup>1</sup> On February 7, 2014, plaintiff filed a request to be updated as to the status of the case, and also to move for a trial date. On February 10, 2014, before the court was aware of plaintiff's filing, the court issued an order directing plaintiff to file a notice of intent to prosecute. Based on the plaintiff's February 7, 2014, pleading, it is clear that plaintiff wishes to prosecute this action. Plaintiff's motion to set a trial date is DENIED without prejudice.

1 In February 2008, plaintiff arrived at Pleasant Valley State Prison. (Am. Compl. at 10.)  
 2 Upon his arrival, Correctional Counselor L. Webb (“Webb”) told plaintiff that Webb intended to  
 3 affix an administrative determinate for violence and arson into plaintiff’s records even though  
 4 plaintiff had never been arrested for a violent crime or a crime involving arson, as defined under  
 5 the California Penal Code. (*Id.* at 10-11.) Webb stated that because plaintiff had been convicted  
 6 of threats and arrested for possession of a destructive device, i.e., tracer ammunition, and the  
 7 California Department of Corrections and Rehabilitation had wide latitude in interpreting the  
 8 laws, Webb could impose the administrative determinates. (*Id.* at 10-11.)

9 Plaintiff filed an administrative grievance, arguing that the determinate labels of violence  
 10 and arson were false. (*Id.* at 12.) Because of the labeling, defendant Counselor Creamer-Todd  
 11 (“Creamer-Todd”) told plaintiff that plaintiff was no longer eligible for the “milestones” time-  
 12 credit program, which would have allowed plaintiff to earn sentencing credits. (*Id.* at 13.)

13 Plaintiff filed another administrative appeal, CTF-S-11-01393, in which plaintiff  
 14 requested a transfer to a counselor other than Creamer-Todd because plaintiff felt that Creamer-  
 15 Todd was incorrect in his response to plaintiff’s previous grievance. (*Id.* at 14.) In that appeal,  
 16 plaintiff called Creamer-Todd’s response “bizarre and bovine.” (*Id.*) Because of plaintiff’s use  
 17 of the words “bizarre and bovine,” plaintiff was issued a disciplinary rules violation report for  
 18 being disrespectful to staff. (*Id.* at 15, Ex. 3 at 49-52.) After a hearing on the rules violation  
 19 report, plaintiff was found guilty of using disrespectful language toward staff, and was issued a  
 20 punishment of a 20-day forfeiture of time-credit. (*Id.* at 16.) Ultimately, plaintiff’s 20-days of  
 21 time-credit were restored. (Creamer-Todd Decl. at ¶¶ 6-8.)

## 22 ANALYSIS

### 23 A. Standard of Review

24 Summary judgment is proper where the pleadings, discovery and affidavits demonstrate  
 25 that there is “no genuine issue as to any material fact and that the moving party is entitled to  
 26 judgment as a matter of law.” Fed. R. Civ. P. 56(c). Material facts are those which may affect  
 27 the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute  
 28 as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a

1 verdict for the nonmoving party. *Id.*

2       The party moving for summary judgment bears the initial burden of identifying those  
3 portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine  
4 issue of material fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323 (1986). Where the moving  
5 party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no  
6 reasonable trier of fact could find other than for the moving party. But on an issue for which the  
7 opposing party will have the burden of proof at trial, as is the case here, the moving party need  
8 only point out “that there is an absence of evidence to support the nonmoving party’s case.” *Id.*  
9 at 325.

10       Once the moving party meets its initial burden, the nonmoving party must go beyond the  
11 pleadings and, by its own affidavits or discovery, “set forth specific facts showing that there is a  
12 genuine issue for trial.” Fed. R. Civ. P. 56(e). The court is only concerned with disputes over  
13 material facts and “factual disputes that are irrelevant or unnecessary will not be counted.”  
14 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It is not the task of the court to scour  
15 the record in search of a genuine issue of triable fact. *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th  
16 Cir. 1996). The nonmoving party has the burden of identifying, with reasonable particularity,  
17 the evidence that precludes summary judgment. *Id.* If the nonmoving party fails to make this  
18 showing, “the moving party is entitled to judgment as a matter of law.” *Celotex Corp.*, 477 U.S.  
19 at 323.

20       At the summary judgment stage, the court must view the evidence in the light most  
21 favorable to the nonmoving party: if evidence produced by the moving party conflicts with  
22 evidence produced by the nonmoving party, the judge must assume the truth of the evidence set  
23 forth by the nonmoving party with respect to that fact. *See Leslie v. Grupo ICA*, 198 F.3d 1152,  
24 1158 (9th Cir. 1999).

25 B. Plaintiff’s Claim

26       Liberally construed, plaintiff claims that defendants retaliated against him for using  
27 protected language, i.e., calling Creamer-Todd’s responses bovine and bizarre, by: (1) charging  
28 plaintiff with a rules violation; (2) finding plaintiff guilty of disrespecting staff; and (3) warning

1 plaintiff to stop using protected language. Defendants argue that plaintiff cannot demonstrate  
2 that any adverse action was taken against him because plaintiff's 20-days loss of credit was  
3 temporary and not significant enough to establish a First Amendment retaliation claim.  
4 Alternatively, defendants argue that they are entitled to qualified immunity.

5 "Within the prison context, a viable claim of First Amendment retaliation entails five  
6 basic elements: (1) An assertion that a state actor took some adverse action against an inmate  
7 (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's  
8 exercise of his First Amendment rights, and (5) the action did not reasonably advance a  
9 legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005)  
10 (footnote omitted)

11 Defendants argue that the "adverse action" taken against plaintiff was the temporary 20-  
12 day loss of credits. However, plaintiff has also alleged that defendants warned plaintiff that  
13 plaintiff's use of disrespectful words was unacceptable and would not be tolerated. (Am. Compl.  
14 at 22-23.) Further, plaintiff has provided evidence of a subsequent filing of a rules violation  
15 report for using disrespectful words. (*Id.* at 23.) In *Brodheim v. Cry*, the Ninth Circuit noted  
16 that the prisoner submitted an administrative grievance, complaining about the conduct of one of  
17 the prison guards. 584 F.3d 1262, 1265 (9th Cir. 2009). In response, one of the appeals  
18 coordinators recategorized the inmate's appeal as a staff complaint, and then rejected it as  
19 untimely. *Id.* The inmate filed a request for an interview with that appeals coordinator, using  
20 what could be interpreted as challenging or disrespectful language, and the appeals coordinator  
21 responded that the rejection of the inmate's appeal was correct. *Id.* The appeals coordinator  
22 further added, "I'd also like to warn you to be careful what you write, req[ue]st on this form."  
23 *Id.* at 1265-66. The Ninth Circuit concluded that the record was sufficient to establish a genuine  
24 issue of material fact as to whether the warning was an adverse action. *Id.* at 1270. "By its very  
25 nature, a statement that warns a person to stop doing something carries the implication of some  
26 consequence of a failure to heed that warning." *Id.*

27 Similarly here, plaintiff's use of "disrespectful" language in his administrative grievance  
28 was admonished in a response to one of plaintiff's appeals. Further, plaintiff was subsequently

1 written up for a rules violation for using that “disrespectful” language, and found guilty of  
2 violating the prison rule. Based on *Brodheim*, the court finds that there is a genuine issue of  
3 material fact whether defendants took some adverse action against plaintiff.

4 Defendants also suggest that plaintiff’s filing of the underlying federal complaint cuts  
5 against plaintiff’s argument that he has been “chilled” from exercising his First Amendment right  
6 to seek redress. However, *Brodheim* squarely rejects this argument. “[A] plaintiff does not have  
7 to show that his speech was actually inhibited or suppressed, but rather that the adverse action at  
8 issue would chill or silence a person of ordinary firmness from future First Amendment  
9 activities.” *Id.* at 1271 (quoting *Rhodes*, 408 F.3d at 568-69). As in *Brodheim*, this court finds  
10 that a reasonable person may have been chilled by defendants’ warning, as well as by the filing  
11 of a rules violation report.

12 Thus, defendants are not entitled to summary judgment on the merits.

13 Alternatively, defendants argue that they are entitled to qualified immunity. Specifically,  
14 defendants argue that the law was not clear regarding whether inmates could be punished for  
15 using hostile or abusive language in a written grievance.

16 The defense of qualified immunity protects “government officials . . . from liability for  
17 civil damages insofar as their conduct does not violate clearly established statutory or  
18 constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*,  
19 457 U.S. 800, 818 (1982). A court considering a claim of qualified immunity must determine:  
20 (1) whether the plaintiff has alleged the deprivation of an actual constitutional right, and (2)  
21 whether such right was clearly established such that it would be clear to a reasonable officer that  
22 his conduct was unlawful in the situation he confronted. *See Pearson v. Callahan*, 129 S. Ct.  
23 808, 818 (2009).

24 In *Bradley v. Hall*, 64 F.3d 1276, 1281-82 (9th Cir. 1995), the Ninth Circuit invalidated  
25 an Oregon Department of Corrections’ prison regulation, and held that “prison officials may not  
26 punish an inmate merely for using hostile, sexual, abusive or threatening language in a written  
27 grievance.” In 2001, the United States Supreme Court explicitly disapproved of the Ninth  
28 Circuit’s “balancing” method used in *Bradley* in analyzing whether such a prison regulation

1 reasonably advanced a legitimate penological interest. *Shaw v. Murphy*, 532 U.S. 223, 228  
 2 (2001) (reaffirming that the factors set forth in *Turner v. Safley*, 482 U.S. 78 (1987) were the  
 3 only factors that the Ninth Circuit should have considered).

4 Subsequently, in *Brodheim*, the Ninth Circuit acknowledged both *Bradley* and *Shaw*, and,  
 5 applying the *Turner* standards, reached the same result as the *Bradley* court. That is, in  
 6 *Brodheim*, the Ninth Circuit found that the threat or warning from the prison official to the  
 7 prisoner was “insufficiently related to legitimate penological interests.” *Brodheim*, 584 F.3d at  
 8 1273.

9 Accordingly, because *Broheim* was decided in 2009, and the allegations against  
 10 defendants took place in 2011-2012, the law was clearly established at the time of the underlying  
 11 events that punishing an inmate for hostile or abusive language is not constitutionally  
 12 permissible. Defendants are not entitled to qualified immunity.

### 13 C. Referral to Pro Se Prisoner Settlement Program

14 Prior to setting this matter for trial and appointing pro bono counsel to represent plaintiff  
 15 for that purpose, the court finds good cause to refer this matter to Judge Vadas pursuant to the  
 16 Pro Se Prisoner Settlement Program for settlement proceedings on the claim set forth above.  
 17 The proceedings will consist of one or more conferences as determined by Judge Vadas. The  
 18 conferences shall be conducted with defendants, or their representatives, attending by  
 19 videoconferencing if they so choose. If these settlement proceedings do not resolve this matter,  
 20 the court will then set this matter for trial and consider a motion from plaintiff for appointment of  
 21 counsel.

## 22 CONCLUSION

- 23 1. Defendants’ motion for summary judgment is DENIED.
- 24 2. The instant case is REFERRED to Judge Vadas pursuant to the Pro Se Prisoner  
 25 Settlement Program for settlement proceedings on the remaining claim in this action, as  
 26 described above. The proceedings shall take place within **one-hundred twenty (120) days** of  
 27 the filing date of this order. Judge Vadas shall coordinate a time and date for a settlement  
 28 conference with all interested parties or their representatives and, within **ten (10) days** after the

1 conclusion of the settlement proceedings, file with the court a report regarding the prisoner  
2 settlement proceedings. If these settlement proceedings do not resolve this matter, plaintiff can  
3 file a renewed motion for appointment of counsel, and the court will then set this matter for trial.

4 3. The clerk of the court shall mail a copy of this order to Judge Vadas in Eureka,  
5 California.

6 4. The instant case is STAYED pending the settlement conference proceedings. The  
7 clerk shall ADMINISTRATIVELY CLOSE this action until further order of the court.

8 IT IS SO ORDERED.

9 DATED: 2/24/14

  
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LUCY H. KOH  
United States District Judge